IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.403 OF 2001

Mustakim Musayab Husain, Age : 18 years,)
R/o. Divagaon Sopan Bhokya Chawl,)
Thane.) ... Appellant
(Orig. Accused 2)

Versus

State of Maharashtra)
(At the instance of Panvel Town Police)
Station, Dist. Raigad).) ... Respondent

Mr. Ganesh Gole for the appellant.

Mr. F.R. Shaikh, A.P.P. for the respondent-State.

ALONG WITH

CRIMINAL APPEAL NO.405 OF 2001

1. Somanath Satyanarayan Tiwari)
Age : 21 years.)
2. Babumiya Idrismiya,)
Age : 18 years., Both R/o. Divagaon)
Sopan Bhokya Chawl, Thare, Originally)
R/o. Village Mursidanad West Bengal.) ... Appellants
(Orig. Accused 1 and 3)

Versus

State of Maharashtra)
(At the instance of Panvel Town Police)
Station, Dist. Raigad).) ... Respondent

Mr. K.S. Patil for the appellants.

Mr. F.R. Shaikh, A.P.P. for the respondent-State.

CORAM : SMT. RANJANA DESAI &
D.G. KARNIK, JJ.

DATED : 23RD MARCH, 2006.

ORAL JUDGMENT:- [Per (Smt.) Ranjana Desai, J.]

1. Criminal Appeal No.403 of 2001 is filed by original accused 2 Mustakim Musayab Husain and Criminal Appeal No.405 of 2001 is filed by original accused 1 and 3 Somnath Satyanarayan Tiwari and Babumiya Odrismiya respectively, being aggrieved by the judgment and order dated 17/4/2001 in Sessions Case No.98 of 1999 delivered by the IInd Additional Sessions Judge, Raigad. For the sake of convenience, we shall refer to the appellants as per their description in the trial court. It would be advantageous to begin by narrating the facts of the case.

2. PW-3 Jagdish Prasad Tiwedi is the husband of deceased Saraswati. He was residing at Sector No.12, House No.12, Road No.12 at Panvel with his wife deceased Saraswati. He used to go for work at 7.30 a.m. and used to return home at 7.30 p.m. On 26/12/1997, he was at work site at Dolvi, Taluka Pen. He got a telephone call that there was a dacoity in his house and his wife was tied with a rope. He immediately rushed to his house at about 5.00 p.m. He entered his house and saw his wife lying on the floor in the pooja

room. A rope was tied around her neck and pieces of cloth were in her mouth. He noticed that cash of Rs.2500/- and the ornaments which were kept in the cup-board and one camera of Minota company and silver coins were stolen from the cup-board. Some ornaments were removed from the person of his wife forcibly. He then filed a complaint, which is treated as FIR and which is at Ex-29. It appears that in his complaint PW-3 Jagdish did not name anybody. He stated that he did not have any suspicion about anybody. It appears that PW-3 Jagdish was further interrogated and, in the interrogation, he gave the name of his cousin Somnath (A-1). Taking clue from this, investigation was started. The accused came to be arrested and certain articles were recovered at the instance of A-1, A-2 and A-3 under panchnama to which we will soon advert.

3. Post-mortem was conducted on the deceased. PW-4 Dr. Ramdas Khune, who did the post-mortem, proved the post-mortem notes and stated that the cause of death was asphyxia due to strangulation. After completion of investigation, the accused came to be charged for offences punishable under sections 120-B, 302 read with sections 120-B, 395 read with section 120-B and, in the alternative, under section 302 read with section 34 of the Indian Penal Code (for short, “the Code”).

4. By the impugned judgment and order, the learned Sessions Judge convicted A-1, A-2 and A-3 for the offence punishable under section 302 read with section 34 of the Code and sentenced them to suffer life imprisonment

and to pay fine of Rs.1,000/- each and in default, to undergo further rigorous imprisonment for four months. A-1, A-2 and A-3 were also convicted for offence punishable under section 392 read with section 34 of the Code and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.2,500/- each and in default to undergo further rigorous imprisonment for one year. This judgment and order is challenged in these appeals.

5. We have heard, at some length, Mr. Patil, the learned counsel appearing for A-1 and A-3 and Mr. Gole, the learned counsel appearing for A-2. The learned counsel contended that the learned Sessions Judge erred in convicting the accused for offence under section 302 of the Code when there is absolutely no evidence on record to connect them with the crime in question. They submitted that the incident in question has taken place on 26/12/1997. The accused came to be arrested on 29/3/1998. There is absolutely no evidence on record to suggest that the accused were last seen with the deceased or that they were together in the house of the deceased. He submitted that there is no evidence to indicate that the accused were seen around the house of the deceased soon after the incident. No weapons of assault have been recovered from the accused. There is no evidence that any blood stained clothes were recovered at their instances. The learned counsel urged that even the discoveries made at their instance are doubtful and are not proved. In such circumstances, on the basis of the alleged discoveries, the learned Sessions Judge could not have convicted the accused for offence punishable under section 302 of the Code. In this

connection, the learned counsel relied on the judgments of the Supreme Court in *Babuda v. State of Rajasthan, 1992 Cri.L.J. 3451* and *Union Territory of Goa v. Boaventura D' Souza, AIR 1993 SC 1199*.

6. The learned counsel also contended that even the discoveries allegedly made at the instance of the accused cannot be believed. They submitted that so far as the discoveries are concerned, the prosecution heavily relies on the evidence of PW-2 Ramesh Malusare. However, PW-2 Malusare has identified wrong persons in the court as the accused. PW-2 Malusare has not referred to panchnama (Ex-41) though he claims to be a pancha to the same. The learned counsel pointed out that one of the panchas i.e. PW-7 Sharad Balit has turned hostile. So far as the evidence of PW-5 PSI Manojkumar Mhatre and PW-6 Prakash More is concerned, their evidence also does not inspire confidence. In the facts of this case, it would be dangerous to base conviction on the evidence of the police officers. The learned counsel contended that the discoveries are alleged to have been made from the same room. If the articles were found in the same room, it is not understood as to why on three different dates, the police officers had to visit the room allegedly at the instance of the accused and recover them. If all the articles were lying in the same room, the room could have been searched and they could have found these articles on the very first day. The learned counsel, therefore, urged that the discovery evidence is doubtful. They

contended that since the evidence on record is not convincing, the conviction and sentence of the accused on the basis of the same should be set aside.

7. Mr. Shaikh, the learned A.P.P. appearing for the State on the other hand submitted that the evidence of panch witness PW-2 Malusare should be believed. There are some discrepancies in his evidence which are entirely due to the lapse of time as he was giving evidence after a period of two years. The leaned A.P.P. Submitted that in any event PW-5 Mhatre and PW-6 More's evidence bears out the prosecution case. The learned A.P.P. urged that the articles discovered at the instance of the accused have been identified by the husband of the deceased and PW-3 Jagdish. PW-3 has no reason to make any false claim. The learned A.P.P. urged that considering the fact that the articles belonging to the deceased were recovered at the instance of the accused, a logical inference will have to be drawn that it is the accused who killed the deceased and committed robbery. He submitted that all the accused are from West Bengal and all are residing together at Panvel. The attendant circumstances are clinching and they point out unerringly to the guilt of the accused and, hence, the conviction and sentence should be confirmed.

8. At the outset, we must note that the impugned judgment and order so far as it convicts the accused under section 302 of the Code and sentences them to life imprisonment is totally unjust and illegal and is not borne out by the evidence on record. It is true that the death of Saraswati was homicidal.

There can be no dispute about that because the post-mortem notes and evidence of PW-4 Dr. Khune and PW-3 Jagdish has not been challenged by the accused in that connection. But, there is absolutely no evidence on record to connect the accused with the murder. There is not a single witness examined by the prosecution to show that the accused were last seen with the deceased or that they were in the house of the deceased or that they were seen near the house of the deceased soon after the incident. No weapons have been discovered at the instance of the accused. There is no evidence to show that any blood stained clothes were recovered at the instance of the accused. In such circumstances, merely on the basis of the discoveries, the accused cannot be convicted under section 302 of the Code. In this connection, reliance placed by the learned counsel on the judgments of the Supreme Court in *Babuda' xase (supra)* and *Union Territory of Goa' xase (supra)* is apt. We have, therefore, no hesitation in quashing and setting aside that part of the impugned order.

9. That takes us to the evidence of the discoveries at the instance of the accused. So far as A-1 is concerned, it is the case of the prosecution that on 29/3/1998 pursuant to the statement made by A-1, the police visited a room in the Railway Quarter at Diva, Panvel and from inside the Railway Quarter, at the instance of A-1, a cord-less telephone (article 16), a gas regulator (article 17) and one hand-bag (article 19) were recovered. The panchnama is at Ex-23 and the memorandum is at Ex-24. PW-2 Malusare is the pancha to this

panchnama. Though PW-2 Malusare has supported the prosecution, it is difficult to place reliance on this witness so far as this discovery is concerned because in the court he has identified A-4 as A-1. PW-8 Sr.P.I. Kawale who is a pancha to recovery panchnama has in his evidence not even made a reference to this panchnama. Moreover, in the panchnama, the description of the room from which these articles were recovered is extremely vague. In such circumstances, in our opinion, it would be hazardous to rely on this discovery. No reliance can be placed on this discovery though it is made immediately on the arrest of the accused on 29/3/1998.

10. According to the prosecution at the instance of A-3, a camera was discovered. Panchnama in this connection is at Ex-41. This discovery is supposed to have been made on 30/3/1998 from the same room from where articles 16, 17 and 19 were recovered. Surprisingly, PW-2 Malusare who is the pancha to this panchnama has only made a reference to Ex-24 in his evidence but he does not talk about Ex-41, which is the memorandum. The second pancha i.e. PW-7 Balit was declared hostile. Resultantly for Ex-41, one may have to turn to only the evidence of PW-5 PSI Mhatre. PW-5 PSI Mhatre has undoubtedly referred to Ex-24 as well as Ex-41. It appears from Ex-41 that this camera was given to one Rafatulla Faiju Shaikh by A-3 and Rafatulla went to Thakurwadi brought the camera and gave it to A-3. However, Rafatulla has not been examined by the prosecution. Moreover PW-2 Malusare has identified in the court A-5 as A-3. In such circumstances, in our opinion, this discovery also cannot be believed.

11. On 9/4/1998, according to the prosecution, at the instance of A-2, from the same room, a casio calculator and two silver coins and a sum of Rs.2,200/- were recovered. PW-2 Malusare has deposed about this panchnama. In this connection, it will also be necessary to refer to PW-5 PSI Mhatre. He has stated that they went to the residence of the accused at village Diva and the accused pointed out to one Suresh Patil. Suresh Patil identified the accused as he was residing in his room. Then the accused asked Suresh Patil to produce the calculator and two silver coins, which he had handed over to him. Accordingly Suresh Patil produced the calculator and two silver coins. He has stated that Suresh Patil opened the room and the articles were produced by the accused. It is pertinent to note that though it is Suresh Patil, who has produced the calculator and two silver coins, Suresh Patil has not been examined by the prosecution. So far as these discoveries are concerned, another reason why we find it difficult to place reliance on them is if all these articles were in the same room then it is difficult to believe that they could not be recovered by the police on 29/3/1998 itself when the police went there allegedly at the instance of A-1. It was not difficult for the police to take search of the room and recover the articles. The claim of the prosecution that at the instance of A-1 on three different dates, the articles were recovered from this room is doubtful.

12. It is also the prosecution case that A-1 took the police to West Bengal and at the instance of A-1 on 12/4/1998 gold bar was discovered from one

Sukumar Pal, a resident of Kandi at West Bengal. The case of the prosecution is obviously that after committing theft in the house of the deceased the gold ornaments were sold by A-1 to a shop owner in West Bengal, who in turn sold them to another shop owner and the gold was melted. We find it extremely difficult to place reliance on this discovery. First of all, it is not possible to identify the ornaments since the ornaments were melted and what was recovered was a gold bar. The shop keepers have not been examined. Besides, the discovery was on 12/4/1998 whereas the incident had taken place on 26/12/1997. In this connection, we may usefully refer to the judgment of the Supreme Court in *Babuda' s case (supra)* where the discovery made after one and half month was disbelieved. It was held that the suspicion, however strong, cannot be the basis of conviction. In the circumstances, we disbelieve this discovery.

13. However, so far as A-3 is concerned, there is one clinching circumstance which in our opinion indicates that he is a receiver of stolen property. He was arrested on 29/3/1998. On his arrest, he was searched and article 15, a ladies citizen watch was found on his person. Panchnama to that effect is at Ex-21 and it was proved by PW-2 Malusare and also by PW-5 PSI Mhatre. The said watch has been identified by PW-3 Jagdish, the husband of the deceased as being the watch belonging to the deceased. We have no reason to disbelieve PW-3 Jagdish. This witness appears to us to be a very honest witness. His evidence is supported by the evidence of pancha PW-2 Malusare. Finding of the watch belonging to the deceased on the person of

A-3 on the day of his arrest is indeed a clinching circumstance, which in our opinion in the circumstances of the case, suggests that he is a receiver of stolen property. Hence, we pass the following order :

O R D E R

"Conviction and sentence of A-1 Somanath Satyanarayan Tiwari, A-2 Mustakim Musayab Husain and A-3 Babumiya Idrismiya under section 302 read with section 34 of the Indian Penal Code and sentence of life imprisonment and sentence of fine of Rs.1,000/- imposed on them in that behalf is quashed and set aside. Conviction of A-1 Somanath Satyanarayan Tiwari, A-2 Mustakim Musayab Husain and A-3 Babumiya Idrismiya for offence under section 392 read with section 34 of the Indian Penal Code and the sentence of rigorous imprisonment of seven years for the same and the sentence of fine of Rs.2,500/- in default further rigorous imprisonment of one year for the same are also set aside. A-3 Babumiya Idrismiya is convicted for offence under section 411 and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1000/- in default to suffer further rigorous

imprisonment of one year. A-1 Somanath Satyanarayan Tiwari is in jail. He may be released forthwith unless otherwise required in any other case. A-2 Mustakim Musayab Husain is on bail. His bail bond stands cancelled. A-3 Babumiya Idrismiya is in jail. It appears that he has already undergone sentence which we have imposed on him by this judgment. If that is so, he may be released forthwith unless otherwise required in some other case.

Criminal appeals are disposed of in the aforestated terms."

[SMT. RANJANA DESAI, J.]

[D.G. KARNIK, J.]